

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
73904-s76M AND 74242-s76M BY KURT)	
KING)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 7, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted to Kurt King for Application 74242-s76M to appropriate up to 500.00 gpm up to 537.67 acre-feet per year of the waters of Fire Creek at a point in the N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29 for power generation. The place of use shall be in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 16 North, Range 23 West, Missoula County. The period of use shall be from January 1 to December 31, inclusive of each year. From April 1 to July 31, the flow rate appropriated shall be 500.00 gpm. From August 1 through March

FILMED

NOV 16 1992

CASE # 73904

31, the flow rate shall be 250 gpm.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights as provided by Montana law.

2. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon request and/or by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

3. This permit is subject to the federal reserved water right of the Lolo National Forest, if any, in the source of supply.

4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

Subject to the terms, conditions, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted to Kurt King for Application 73904-s76M to appropriate 50.00 (gpm) up to 23.20 acre-feet per year of the

waters of Fire Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. Six acre-feet of water per year shall be used for domestic purposes for five homes in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, 0.20 acre-feet of water per year shall be used for 17.5 animal units of stock in the N $\frac{1}{2}$ of Section 29, and 17.00 acre-feet of water per year shall be used for irrigation of 7.5 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. The period of use for the stock water and domestic use shall be from January 1 through December 31, inclusive of each year. The period of use for irrigation shall be from April 15 through October 15, inclusive of each year.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights (including federal reserve water rights), as provided by Montana law.

2. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon request and/or by November 30 of each year to the Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

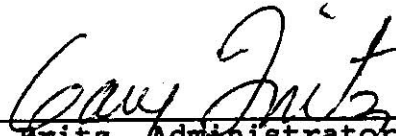
3. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

Transfer Certificate, Form 608, pursuant to Mont. Code Ann. §
85-2-424 (1991).

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 29 day of September, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 30th day of September, 1992 as follows:

Kurt King
P.O. Box 1045
Hamilton, MT 59840

Mr. & Mrs. Larry Van Hise
Rising Sun Tavern Rd.
Clarksburg, NJ 08510

Christopher B. Swartley
Attorney at Law
201 W. Main St.
Missoula, MT 59802

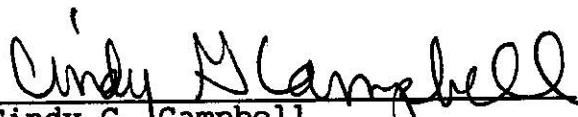
Land & Water Consulting
& Lee Yelin
P.O. Box 8254
Missoula, MT 59807
(For Notification Only)

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)

Lolo National Forest
& Orville L. Daniels
Bldg. 24 Fort Missoula
Missoula, MT 59801

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
73904-s76M AND 74242-s76M BY KURT)
KING)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 24, 1992, in Missoula, Montana, to determine whether Beneficial Water Use Permits should be granted to Kurt King for the above-entitled Applications under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1989).

APPEARANCES

Applicant Kurt King appeared at the hearing in person and by and through counsel Robert Scott.

Lee Yelin, Water Rights Specialist with Land and Water Consulting, Inc. appeared at the hearing as a witness for the Applicant.

Bill Koerner, with Water Power Machinery, appeared at the hearing as a witness for the Applicant.

Objector Lolo National Forest appeared at the hearing by and through Arne Rosquist, Forest Hydrologist.

Objectors Mr. and Mrs. Larry Van Hise appeared at the hearing by and through counsel Christopher B. Swartley.

CASE # 73904

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Larry Schock, Civil Engineering Specialist with the Department's Missoula Water Resources Regional Office, appeared at the hearing.

Cindy G. Campbell, Hearings Unit Legal Secretary, attended the hearing.

EXHIBITS

The Applicant offered five exhibits for inclusion into the record. There were no objections to any of the exhibits.

Applicant's Exhibit 1 consists of four pages. The first page is a letter to Kurt King from Crystal Walkup, Soil Conservationist with the Soil Conservation Service (SCS). The second page is a diagram of the proposed contour ditches. The third page shows the layout of the proposed sprinkler system. The fourth page is an enlarged portion of a USGS Quad map.

Applicant's Exhibit 2 is a copy of a portion of a USGS Quad map which has been enhanced to show the proposed point of diversion, the proposed places of use, the penstock location, the proposed pipeline routes, and Objectors Van Hise's claimed points of diversion.

Applicant's Exhibit 3 is a design sheet produced by the SCS showing the specifications of the different components of the diversion structure.

Applicant's Exhibit 4 consists of two pages which are copies of warranty deeds. One transfers the subject property to Steven M. Murphy from Keith H. and Laura Rankin. The other transfers the property from Steven M. Murphy to Applicant.

Applicant's Exhibit 5 consists of eight pages which are actual measurements of the flow of Fire Creek taken by Lee Yelin and Arne Rosquist.

The Department files were made available for review by all parties who had no objection to any part of the files. Therefore, the Department files are accepted into the record in their entirety.

PRELIMINARY MATTERS

Applicant originally proposed by Application 74242-s76M to appropriate 2,000 gallons per minute (gpm) up to 2,152 acre-feet per year for power generation and fish raceways. The notice published in the Missoulian and the notices sent to individuals stated this intent. On August 2, 1991, Applicant's consultant submitted an amendment authorized by the Applicant reducing the flow rate to 500 gpm from April 1 through July 31 and to 250 gpm from August 1 through March 31. The volume was reduced to 537.67 acre-feet per year. The fish raceways were deleted from the Application. The proposed place of use was changed to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 16 North, Range 23 West, Missoula County.¹

¹Unless otherwise specified, all land descriptions in this Proposal are located in Township 16 North, Range 23 West, Missoula County.

Application 73904-s76M originally proposed 50 gpm up to 5.00 acre-feet per year for domestic use; 50 gpm up to 19.00 acre-feet per year for irrigation of 30 acres of an orchard, garden, and several greenhouses; and 50 gpm up to .85 acre-feet per year for stock water for 50 animal units. This Application was amended on April 2, 1990, to reflect 18 acres of irrigation. This Application was further amended at the hearing to reflect a use of 6.00 acre-feet of water per year for domestic use; 17.00 acre-feet of water per year for irrigation of 12.00 acres and no greenhouses; and 0.20 acre-feet of water per year for 17.5 animal units. Although the volume of water requested for domestic use in the amendment is larger than the original Application, the total volume is less. Thus the total proposed flow rate and volume are 50 gpm up to 23.2 acre-feet of water per year. Applicant further reduced the proposed irrigated acreage to 7.5 acres when he submitted the revised irrigation design and measuring device information to the Department on July 2, 1992. Prior to the last acreage reduction, the irrigation would have been deficit irrigation. The acreage reduction now allows for full irrigation of the proposed acreage.

An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications W19282-s41E and W19284-

s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli.

Since the amendments reduced the flow rates and volumes of water to be diverted of both Applications and corrected the land description of the proposed place of use of Application 74242-s76M, there is no need to republish the Application as no objector or potential objector could be prejudiced by the amendments.

The record was left open until July 27, 1992, for submission of a properly signed agreement by the Lolo National Forest and the submission of the irrigation system design and a discussion of the deficit irrigation by the Applicant. The Missoula Water Resources Regional Office and Objectors Van Hise then must submit their comments regarding the irrigation design and operation to the Hearing Examiner within 14 days of the service date of the information. Applicant may rebut any comments within seven days of the service date of the comments.

Applicant's irrigation design was received by the Hearing Examiner on July 6, 1992. On July 15, 1992, the Hearing Examiner received comments from the Missoula Water Resources Regional Office concerning the new irrigation design and operation. The Hearing Examiner received a properly signed agreement from the Lolo National Forest on July 17, 1992. Applicant's response to comments by the Missoula Water Resources Regional Office was received by the Hearing Examiner on July 27, 1992.

During the hearing, Applicant verbally moved that the Hearing Examiner take official notice of the Temporary Preliminary Decree on the Clark Fork River Between the Blackfoot River and the Flathead River, Basin 76M, particularly the water rights of Objectors Van Hise. There being no objection to this motion the Hearing Examiner does take notice of the Temporary Preliminary Decree as it pertains to Water Rights W107873-76M, W107876-76M, and W107877-76M.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1989) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Kurt King duly filed Application for Beneficial Water Use Permit 73904-s76M with the Department on February 14, 1990. On March 27, 1990, Kurt King duly filed Application for Beneficial Water Use Permit 74242-s76M with the Department. (Department files.)

3. Pertinent portions of the Applications were published in the Missoulian, a newspaper of general circulation in the area of the source, on May 30, 1990. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

One timely objection to Application 73904-s76M and two timely objections to Application 74242-s76M were received by the Department. Applicant was notified of the objections by a letter dated June 20, 1990. (Department files.)

4. By Application 73904-s76M, Applicant proposes to appropriate 50.00 (gpm) up to 23.20 acre-feet per year of the waters of Fire Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. Six acre-feet of water per year would be used for domestic purposes for five homes in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, 0.20 acre-feet of water per year would be used for 17.5 animal units of stock in the N $\frac{1}{2}$ of Section 29, and 17.00 acre-feet of water per year would be used for irrigation of 7.5 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. The proposed period of use for the stock water and domestic use is from January 1 through December 31, inclusive of each year. The proposed period of use for the irrigation is from

April 15 through October 15, inclusive of each year. (Department files, Applicant's Exhibit 2, and testimony of Lee Yelin.)

Six acre-feet of water per year for domestic use in five homes is 1.25 acre-feet of water per year for each home. The average use for domestic use is 1.5 acre-feet of water per year for a family of five and .25 acre of lawn. Applicant's consultant testified the lawn to be irrigated was less than a quarter of an acre, approximately one-half that size. The amount of water requested for domestic use is reasonable. The final revision of the irrigated acreage is 7.5 acres of pasture to be irrigated by 17.00 acre-feet of water per year which is 2.27 acre-feet per acre per year. The amount of water recommended by the USDA Soil Conservation Service (SCS) for the soils, location of the proposed place of use, method of irrigation, and crop to be grown is from 2.09 acre-feet per acre of water per year for a normal year to 2.76 acre-feet per acre of water per year for a drought year. The proposed amount of 17.00 acre-feet per year for irrigation is reasonable. Applicant's revised stock water use is 0.20 acre-feet of water per year for 17.5 animal units. This amount of water is slightly less than the 15 gallons of water per day per animal unit recommended by the Department. According to the Hearing Examiner's calculations the amount necessary for 17.5 animal units is 0.29 acre-feet of water per year. Nevertheless, the amount of stock water requested by the Applicant would be beneficially used. (Testimony of Lee Yelin, Applicant's revised irrigation schedule, written comments from

the Missoula Water Resources Regional Office, and Department files.)

5. By Application 74242-s76M, Applicant seeks to appropriate up to 500.00 gpm up to 537.67 acre-feet per year of the waters of Fire Creek at a point in the N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29 for power generation. The proposed place of use is the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. The proposed period of use is from January 1 to December 31, inclusive of each year. From April 1 to July 31, the flow rate appropriated would be 500.00 gpm. From August 1 through March 31, the flow rate would be 250 gpm.¹ (Testimony of Lee Yelin and Department files.)

6. The proposed means of diversion for both Applications are pipe inlet structures designed by the SCS. The structures proposed are concrete boxes with grates over them and a pipe of the appropriate size coming out of each box. One would be installed on the north side of Fire Creek to supply the hydropower facility and one home. A Parshall flume with a nine-inch throat would be permanently installed in the channel of Fire Creek upstream of these diversions to allow measurement of the

¹The Hearing Examiner calculated the proposed periods of use at the proposed flow rates. From April 1 through July 31 is 122 days. From August 1 through March 31 is 243 days. A flow rate of 500 gpm for 122 days would yield 269.57 acre-feet of water. A flow rate of 250 gpm for 243 days would yield 268.46 acre-feet of water. The sum of 269.57 and 268.46 is 538.03. However, the Department can issue a permit for less than the Applicant requested but can never issue a permit for more than requested; therefore the amount requested on the Application cannot be changed. Mont. Code Ann. § 85-2-312(1) (1991).

stream after high water.' The pipeline to the hydropower plant would be eight inches in diameter. After the water entered the pipe, just before the penstock, there would be a one-inch tee to serve the home on the north side of Fire Creek. The water would then go through the penstock and down to the powerhouse to run the Pelton wheel which would be six inches in diameter. The penstock would be approximately one-half mile long with a drop of 300 feet. There would be two nozzles. One would be one inch in diameter and the other would be five-eighths inch in diameter. The nozzles would spray on the Pelton wheel to generate 13.5 to 18 kilowatts of power to be used in the homes. From the powerhouse, the water would exit into an open channel lined with halved eight-inch corrugated metal pipe. About half way, there would be a break in the pipe to allow the water to flow through a Parshall flume for measuring. The water would then flow back into the halved eight-inch pipe which would carry the water, substantially undiminished, back to Fire Creek in approximately the same amount of time needed for the Creek to flow naturally to the point of discharge.

The other pipeline inlet structure would be installed in the south side of Fire Creek to be used for irrigation of 7.5 acres and to supply four homes and 17.5 animal units. The proposed pipeline size to supply the irrigation water, four homes, and the

'During the hearing, Lee Yelin testified that a rectangular weir would be installed in the wing. The revised irrigation design sent to Applicant by Crystal Walkup recommends a v-notch weir. After receiving comments from the Missoula Water Resources Regional Office, Applicant decided to install a Parshall flume.

stock water, is three inches. An in-line meter would be installed in the three-inch line downstream from the inlet so the amount of water diverted for irrigation, stock, and multiple domestic use could be measured. The buried pipeline would be equipped with one-inch lateral tees to supply each of the four homes. The water pressure to the homes would be approximately 20 to 30 pounds per square inch which is less than the optimum pressure found in city residences, but adequate. The domestic use and the irrigation cannot occur simultaneously. There is insufficient water.' Irrigation would begin at 9:00 p.m. and cease at 8:30 a.m. each night and occur on a twelve-day rotation. The design indicates a six-day rotation; however, the irrigation system would not be operated on a 24-hour day. It would be operated only at night in 11.5 hour settings which would require a twelve-day rotation. The system would not be operated continuously at the conclusion of the twelve-day rotation. Irrigation would occur only when needed, approximately 10 to 15 irrigations per seasons which is average for the area. A booster pump would be needed to irrigate the western end of the proposed place of use, approximately 3.5 acres, since there is insufficient elevation change to adequately supply pressure to the sprinkler system at that location. The SCS has recommended a three-quarter horsepower booster pump which is acceptable to the Applicant. The remainder of the irrigation would be accomplished

'The domestic use from Fire Creek will be supplemented by several developed springs so the home owners will not be without water during the hours the irrigation is occurring.

by a gravity-flow sprinkler system designed by the SCS. The design includes a three-inch supply line with three-inch by three-inch by 36-inch risers to supply hand line sprinklers. The proposed place of use for irrigation appears to be located at the toe of a north-facing slope in a narrow east-west canyon. The proposed period of use for irrigation is from April 15 through October 15 which is an extremely long irrigation season for such a place of use. However, Applicant wanted to assure that on a dry year, if needed, he could begin irrigating early and continue late in the season. Most years he would not exceed a period of use from May 1 through September 30 which is, in itself, quite a long period of use for the proposed parcel. (Applicant's revised irrigation schedule, response to Missoula Water Resources Regional Office written comments, and testimony of Lee Yelin, Michael McLane, and Bill Koerner.)

7. Fire Creek is a small perennial stream. Lolo National Forest prepared a computer flow model generated report dated October 10, 1990, to show what can be expected of Fire Creek in an average year. The report shows the average volume of runoff to be approximately 5,836 acre-feet per year. The average daily flow expected in January would be 1.8 cubic feet per second (cfs), February - 2.00 cfs, March - 1.7 cfs, April - 6.9 cfs, May - 22.6 cfs, June - 29.2 cfs, July - 9.4 cfs, August - 8.9 cfs, September - 8.3 cfs, October - 2.5 cfs, November - 1.4 cfs, and

December - 1.8 cfs.' Flow measurements were taken by Lee Yelin and Arne Rosquist on July 16, 1990, at 3.9 cfs; on August 13, 1990, the flow was 2.1 cfs; and on September 7, 1990, the flow was 1.74 cfs. On June 27, 1990, Mr. Yelin measured the flow at 27 cfs and the Applicant measured the flow at 26 cfs in April of 1990. Mr. Rosquist characterized the year of 1990 as a dry year, about 80 percent of the normal precipitation.

These measurements and estimated monthly flows indicate there is water available for the proposed consumptive uses at all times. However, while water is physically available all year in the amount requested for the power generation, there may be three or four months and other days in other periods when the power generation would need to be curtailed or stopped completely because the flow would be less than 2.00 cfs which is needed for fish survival in the stream. (Testimony of Lee Yelin and Department file.)

8. There would be approximately one-half mile between the intake and the outlet of the hydropower plant. In order to protect the fish in this reach of the stream, Applicant has agreed not to appropriate water when the flow rate of Fire Creek

'A flow model is theoretical. The yield in acre-feet was determined by the size of the watershed. The distribution of that runoff was taken from a similar watershed, in this case Rattlesnake Creek, which has actual data from studies. That information was adjusted to fit the Fire Creek drainage and the monthly distribution of the water was determined by using percentages, i.e., taking the percentages of the total runoff that flowed in January on Rattlesnake Creek and applying that percentage to the total runoff of Fire Creek to estimate the January runoff, etc.

is less than 2.00 cfs. (Testimony of Lee Yelin and Department file.)

9. Bill Koerner has been with Water Power Machinery for 14 years as a designer of hydropower plants. Mr. Koerner designed a hydropower plant for the Applicant.

To generate power, a sufficient amount of water to fill a pipeline is dropped over a distance of elevation to build up water pressure. The water is brought through small nozzles which are focused on the buckets on a Pelton wheel.' The water pressure drives the wheel which is connected to a generator or alternator and produces energy. The amount of energy produced depends on the volume of water available and the elevation of the falling water. For every 100 feet of fall, a hundred gallons of water will produce 1.5 kilowatts of power. After the water strikes the wheel, it becomes inert and drops into a pond, then flows back into the source.

For the Applicant's proposed plant using the six-inch wheel, the two nozzles would be used as water is available. A one-inch nozzle at 300 feet of fall would use up 325 gpm so a flow rate of 500 gpm would require the one-inch nozzle and a five-eighths inch nozzle which would produce from 13.5 to 18 kilowatts of power. When the flow of water diminishes, the nozzles could be changed to a smaller size. The nozzles could also be operated independently. When water diminishes, one of the nozzles could

'A Pelton wheel is a wheel with buckets designed in the 1800's by a man named Pelton.

be shut off. The flow of water could diminish to 30 gpm and still produce one kilowatt of power. Any water that would flow through the plant could produce power. Applicant's hydropower plant would use an alternator which can be run at any speed and produces alternating current which can be used in most homes as opposed to a generator which must be run at a constant speed and produces direct current. (Testimony of Bill Koerner and Department file.)

10. Applicant owns the proposed place of use. (Applicant's Exhibit 4 and testimony of Lee Yelin.)

11. Lolo National Forest shares a water right claimed by Statement of Claim W52545-76M for stock water claiming a priority date of 1915. That Statement of Claim was given no flow rate or volume of water in the Temporary Preliminary Decree. The general Findings of Fact in the Temporary Preliminary Decree limited stock water rights to a consumptive use of 30 gallons per day per animal unit. Lee Yelin stated and Mr. Rosquist concurred the property owned by Lolo National Forest is very small, "less than a couple acres" that could not support very many animal units.

Lolo National Forest may also have an unquantified federal reserved water right. (Department records and testimony of Michael McLane, Lee Yelin, and Arne Rosquist.)

12. Lolo National Forest is mandated to maintain fish and wildlife habitat. Its main reason for objecting to Applicant's proposed project was the diversion has the potential of dewatering a reach of Fire Creek that would impact greatly on

fish habitat. The Clark Fork River has been heavily developed in the area and many of the contributing streams have been cut off as access for fish to do their spawning and raising of small fish. If a large portion of the watershed of Fire Creek were disrupted by a reach of stream being dewatered, a considerable amount of spawning and rearing habitat would be lost. Lolo National Forest works closely with Montana Department of Fish Wildlife and Parks which has identified all the tributaries in the Nine Mile watershed as critical to sport fisheries in the Missoula area. Lolo National Forest has agreed to the issuance of a permit for this Application if the permit would be conditioned so the Applicant must cease appropriating when the flow rate of Fire Creek diminishes to a flow rate of 2.00 cfs which has been identified by Montana Department of Fish, Wildlife and Parks as the "fish survival flow", i.e., 2.00 cfs is the least amount of flow rate in which fish can survive. (Testimony of Arne Rosquist.)

Applicant and Lolo National Forest have reached an agreement which resolved the objection of Lolo National Forest and acknowledged the possibility of a federal reserved water right by Lolo National Forest. (Agreement received by the Department on July 17, 1992.)

13. Objectors Van Hise hold Water Rights W107873-76M, W107876-76M, and W107877-76M. Water Right W107873-76M, according to the Temporary Preliminary Decree, is to appropriate 2.50 cfs up to 752 acre-feet per year of the waters of Ninemile Creek by

means of a headgate at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21 to irrigate 80 acres in the NE $\frac{1}{4}$ of Section 28. Water Right W107876-76M, according to the Temporary Preliminary Decree, is to appropriate 1.25 cfs up to 540.37 acre-feet of the waters of Fire Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21 by means of a headgate to irrigate 66 acres in the W $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28. Water Right W107877-76M, according to the Temporary Preliminary Decree is for 0.50 cfs up to 183 acre-feet of the waters of Fire Creek to irrigate 80 acres in the NE $\frac{1}{4}$ of Section 28 by means of a headgate located at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21. Water Rights W107877-76M and W107873-76M have a remark that there are overlapping places of use and that each right is limited to the flow rate, volume, place of use and beneficial use of that individual right. (Department records.)

Mr. and Mrs. Van Hise are concerned that there may not be unappropriated water in the source and since there is a permit granted to another appropriator on an unnamed tributary of Fire Creek, they are concerned about the cumulative impact on their water rights. (Department files.) Neither Mr. nor Mrs. Van Hise attended the hearing in person and their counsel did not call witnesses on their behalf.

14. There are no planned uses for which a permit has been granted or for which water has been reserved that would be adversely affected by the Applicant's proposed use. (Testimony of Lee Yelin.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1, 2, and 3.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.
3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1989) are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and
- (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses of water, domestic, irrigation, stock, and power generation, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2), (1989). Applicant can beneficially use any amount of water diverted for power generation. See Finding of Fact 9. The other proposed uses would benefit the Applicant. The proposed domestic use of water would benefit Applicant either for his personal use or for use by other persons in their homes to the benefit of the Applicant. The stock water use would supply water necessary for the livestock Applicant intends to have for his own enjoyment. The irrigation use would be used to irrigate the pasture for the Applicant's livestock. The amount of water to be appropriated is reasonable for the proposed purposes. See Findings of Fact 4 and 5.

5. The Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 10.

6. The proposed means of diversion, construction, and operation of the appropriation works for Application 74242-s76M, the power generation and domestic use, are adequate. See Findings of Fact 5, 6, 8, and 9.

The proposed means of diversion, construction, and operation of the appropriation works for Application 73904-s76M, the domestic, irrigation, and stock water use, are adequate. See Findings of Fact 4 and 6.

7. For both Applications, the Applicant has provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed points of diversion at times when the water can be put to the use proposed by the Applicant and that during the period in which the Applicant seeks to appropriate, the water is reasonably available in the amount requested. See Findings of Fact 4, 5, and 7.

The evidence shows there is always sufficient water for the consumptive use, but while water may be physically available at all times for power generation there would be times Applicant would dewater the reach of stream between the intake and the discharge points of the power plant if water were diverted for hydropower. However, all that need be shown is that there is sufficient water in at least some periods for his appropriation. In re Application 41255-g41B by Allred; In re Application 77494-s42M by Kreiman. The record shows more than 2.00 cfs of water were available on certain days in April, June, July, and August of 1990, a dry year, by actual measurements and that a flow rate in excess of 2.00 cfs may be expected to flow in Fire Creek at times in all months except December, January, February, and March. It is true the model presents an expected daily average flow for any given month and there may be days in the months of

April through November when the flow rate would be less than 2.00 cfs, but on the other hand there may be days in the months of December through March when the flow would exceed 2.00 cfs. See Finding of Fact 7 and 8. Applicant has shown he can beneficially use any amount of water diverted for power generation. The flow rate need not be the full 500 gpm for the Applicant to be able to generate power. See Finding of Fact 9.

8. Applicant has provided substantial credible evidence there would be no adverse effect to prior water rights. Applicant has agreed to cease appropriating water for power generation when the flow of Fire Creek diminishes to a rate of 2.00 cfs, a flow rate identified as the minimum flow rate for fish survival. See Finding of Fact 7, 8, 11, and 12.

Objectors Van Hise would not be adversely affected by the nonconsumptive use of power generation since their point of diversion is downstream of the discharge point. See Finding of Fact 13. If the flow of the creek fell below 2.00 cfs and the Applicant was not diverting for power generation but was diverting 50 gpm for the other uses when the water were required by Objectors, they would need only call the source and the Applicant would be required to cease appropriation until either the Van Hise's no longer needed the water or the flow of the creek increased so that both Applicant and Objectors could divert. Having to call for water is not an adverse effect. The appropriative system by its very nature contemplates that the supply is less than the rights on a stream. That is the

foundation for the rule of which appropriator is to forego exercise of its rights in those times of shortage. "First in time, first in right" would never operate if no call were ever made. MPC v. State ex rel. Carey, 41 St. Rep. 1233, 685 P.2d 386, (1984).

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved. See Finding of Fact 14.

10. The Department is not bound by an agreement between the Applicant and Lolo National Forest. See Finding of Fact 12. Only those portions of the agreement relating to fulfillment of the statutory criteria may be included in permit conditions. The part of the agreement that requires the Applicant to "submit said records upon request of the Lolo National Forest Supervisor" is an agreement between those parties. The Lolo National Forest Supervisor can obtain those records directly from the Applicant without participation of the Department. That portion of the agreement need not be a condition on the permit. Those records will also be available from the Missoula Water Resources Regional Office.

The third condition of the agreement between Lolo National Forest and Applicant cannot be a condition on the permit since it does not ensure that a criterion set forth in Mont. Code Ann. § 85-2-311, (1991) will be satisfied. Mont. Code Ann. § 85-2-312(1) (1991) allows the Department to condition a permit only

with terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a permit. There is no water right of record for the 2.00 cfs to be protected. It is true Lolo National Forest may have a federal reserved water right; however that right, if it exists, has not been quantified. If indeed a compact is reached in accordance with Mont. Code Ann. Title 85, chapter 2, parts 2 and 7, the amount of the federal reserved water could be greater or less than the 2.0 cfs agreed upon. If a compact is not reached, the federal reserved right would be adjudicated by the Water Court which also could decree an amount greater or less than the 2.00 cfs. Nevertheless the agreement has been accepted by Applicant and Lolo National Forest and that agreement will prevent Applicant and his successors of interest from dewatering the reach of stream between the intake and discharge of the power plant.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted to Kurt King for Application 74242-s76M to appropriate up to 500.00 gpm up to 537.67 acre-feet per year of the waters of Fire Creek at a point in the N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29 for power generation. The place of use shall be in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 16 North, Range 23 West, Missoula County.

The period of use shall be from January 1 to December 31, inclusive of each year. From April 1 to July 31, the flow rate appropriated shall be 500.00 gpm. From August 1 through March 31, the flow rate shall be 250 gpm.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights as provided by Montana law.

2. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon request and/or by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

3. This permit is subject to the federal reserved water right of the Lolo National Forest, if any, in the source of supply.

4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

Subject to the terms, conditions, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted to Kurt King for Application 73904-s76M to appropriate 50.00 (gpm) up to 23.20 acre-feet per year of the waters of Fire Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. Six acre-feet of water per year shall be used for domestic purposes for five homes in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, 0.20 acre-feet of water per year shall be used for 17.5 animal units of stock in the N $\frac{1}{2}$ of Section 29, and 17.00 acre-feet of water per year shall be used for irrigation of 7.5 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. The period of use for the stock water and domestic use shall be from January 1 through December 31, inclusive of each year. The period of use for irrigation shall be from April 15 through October 15, inclusive of each year.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights (including federal reserve water rights), as provided by Montana law.

2. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon request and/or by November 30 of each year to the Water Resources Regional Office,

Holiday Village Professional Plaza, Suite 105, P.O. Box 5004,
Missoula, MT 59806 PH: (406) 721-4284.

3. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 7th day of August, 1992.



Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CASE # 73904

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 7th day of August, 1992, as follows:

Kurt King
2160 Dallin St.
Salt Lake City, UT 84109

Mr. & Mrs. Larry Van Hise
Rising Sun Tavern Rd.
Clarksburg, NJ 08510


Christopher B. Swartley
Attorney at Law
201 W. Main St.
Missoula, MT 59802

Lolo National Forest
% Orville L. Daniels
Bldg. 24 Fort Missoula
Missoula, MT 59801

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Land & Water Consulting
% Lee Yelin
P.O. Box 8254
Missoula, MT 59807
(For Notification Only)

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(Via Electronic Mail)


Cindy G. Campbell
Hearings Unit Legal Secretary